No. 84-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. AND THE AMERICAN ADVERTISING FEDERATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE

This brief is submitted jointly by the Outdoor Advertising Association of America, Inc. (OAAA) and the American Advertising Federation (AAF) as amici curiae. Amici have secured the consent of each party

to the filing of this brief. Amici support the position of appellees in this case and urge affirmance of the decision below.

The OAAA is the trade association of the standardized outdoor advertising industry in the United States. Outdoor advertisers maintain off-premise posters and painted bulletins which disseminate commercial and non-commercial messages that do not pertain to activities conducted on the premises on which the outdoor advertising signs are located. The OAAA's membership is composed of one hundred sixty-nine companies which serve 7,900 distinct local areas throughout the United States.

The American Advertising Federation is a national trade association which includes within its membership representatives of all of the various elements of the advertising industry. The membership of the Federation includes companies which manufacture and sell consumer products, advertising agencies, outdoor advertising companies, newspaper and magazine publishers, radio and television broadcasters and networks and approximately 22 other trade associations with memberships composed of companies engaged in various advertising pursuits. The Federation is also the parent body of more than 200 local advertising clubs and federations located throughout the United States which have a combined membership of approximately 36,000 advertising practitioners.

Amici have a direct interest in this case because it presents fundamental questions regarding judicial review of an ordinance that impinges on speech protected by the First Amendment. Many different media disseminating commercial and non-commercial mes-

sages, including newspapers, TV and radio broadcast facilities and off-premise signage, are subject to government zoning regulations. As a result, this Court's decision in this case may have an impact upon Amici's membership insofar as it may treat the regulation of speech through zoning restrictions.

SUMMARY OF ARGUMENT

This case is positioned at the friction point of two potentially conflicting lines of precedent. In general, state and local governments have been accorded broad latitude in decisions regarding land use. *Berman* v. *Parker,* 348 U.S. 26 (1954). Nevertheless, this Court has tightly reined in the exercise of that authority and refused simply to defer to local discretion where land use issues transcend purely police power concerns and impact on First Amendment freedoms. *Schad* v. *Borough of Mt. Ephraim,* 452 U.S. 61 (1981). In such circumstances, the Court has sought to strike a realistic balance through a carefully constructed analytic framework that permits content neutral restrictions governing the time, place and manner of protected expression. Such restrictions are constitutional where they are found to serve a concrete and substantial governmental interest that is unrelated to the suppression of speech and where they result in only an incidental impact on protected speech that is no greater than is essential to the furtherance of the governmental interest that is involved. *United States* v. *O'Brien,* 391 U.S. 367 (1968).

The *O'Brien* test gives specific guidance to law makers on what is necessary to promulgate constitutional time, place, and manner restrictions. In a sense, the

viability of the *O'Brien* test depends upon the integrity of the local legislative process itself in each separate community across the United States. But, in the final analysis, the degree to which protected speech remains free from governmental encroachment through land use restrictions depends upon meaningful judicial review.

It is inevitable that local legislative decisions tend to reflect immediate pressures exerted from within the community. The intensity of these pressures is evident in the record in the instant case. Thus, the statement of reasons for enactment set forth in the Renton ordinance gives vent to the community's apprehensions that the presence of adult theaters would destroy the town by threatening the commercial and retail bases of the city and causing residents to move away. *Playtime Theatres, Inc.* v. *Renton, et al.*, 748 F.2d 527, 530-31, n.3 (9th Cir. 1984). The pressure that mounted on Renton officials in these circumstances to give First Amendment concerns short shrift is palpable in these statements.

At any given point in time, a community may believe that its quality of life, appearance or property values are threatened by all manner of First Amendment-related activities, such as street corner newsboxes, broadcast transmissions towers, picketers, commercial and non-commercial signage, sound trucks, leafletting or adult threaters. When this occurs, it cannot be presumed that the locality will strike a constitutional balance when it legislates. The cauldron of the local legislative process therefore makes it imperative that the procedural safeguards for meaningful and thorough judicial review are not compromised.

The City of Renton urges this Court to reject the careful scrutiny which the Ninth Circuit applied to the instant ordinance. The effect of this would be to broaden the discretion accorded to local legislative decisions which impinge upon speech protected by the First Amendment and to undercut the high degree of judicial vigilance that is mandated in these circumstances. The resulting expansion of deference to law makers would reduce the constitutional safeguards of judicial review to a meaningless ritual, with the Courts superficially reviewing enactments which rely upon a mechanistic recitation of "constitutionally correct" findings for their validity.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS APPLIED PROPER STANDARDS IN SCRUTINIZING THE RENTON ORDINANCE

In the instant case, the Ninth Circuit applied correct constitutional standards when it reviewed the Renton zoning ordinance after properly conducting an independent *de novo* review of the record evidence and assigning to the City of Renton the burden of justifying its ordinance.

A. The Appellate Court Properly Conducted An Independent Review Of The Record To Determine Whether The Renton Ordinance Was Constitutional

The general rule of statutory review is that a law is presumed to be valid and will be sustained if it is rationally related to a legitimate government interest. *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1980). The Constitution generally presumes that even improvident decisions will eventually be rectified by the democratic

processes. *Cleburne* v. *Cleburne Living Center,* 473 U.S. —— (1985). But under the decisions of this Court, that general rule gives way quickly where a law impinges on fundamental First Amendment rights. In those circumstances, the law is subjected to strict and independent scrutiny by the Courts. *See, e.g., Schad* v. *Mount Ephraim, supra* at 452 U.S. 77; *Police Department of Chicago* v. *Mosley,* 408 U.S. 91, 98-99 (1972); *Cleburne* v. *Cleburne Living Center, supra.* Under these circumstances, this Court has made it clear beyond peradventure that the duty of an appellate court is to conduct a *de novo* review of the record and not simply to defer to the findings of the trial court. *Feiner* v. *New York,* 340 U.S. 315, 316 (1951). *See, also, Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Time, Inc.* v. *Pape,* 401 U.S. 279, 284 (1971). As recently as last year, this Court reaffirmed this principle, ruling in a defamation case that Federal Rule of Civil Procedure 52(a)[1] does not prevent federal appellate judges from conducting a *de novo* review of the evidence in the record. *Bose* v. *Consumers Union,* 466 U.S. —— (1984).

The Ninth Circuit correctly held in the instant case that it had an "obligation to scrutinize strictly the zoning decisions that infringe on first amendment rights" through *de novo* review of the facts to determine whether the Renton ordinance satisfied the criteria for a valid "time, place and manner" restriction on protected speech. *Playtime Theatres, Inc.* v. *The*

[1] Federal Rule of Civil Procedure 52(a) states: "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

City of Renton, et al., supra at 748 F.2d 534. *United States* v. *O'Brien, supra.*

After conducting that *de novo* review of the record, the Court of Appeals independently determined that, despite the superficial attractiveness of Renton's legislative scheme, the land ostensibly set aside by Renton for adult theaters was, in fact, largely occupied and not actually available. Under these circumstances, the Court of Appeals found that the Renton ordinance did not provide a viable remedy, since it seriously limited the number of sites for adult theaters. Therefore, unlike the Detroit ordinance in *Young* v. *American Mini Theaters,* 427 U.S. 50 (1976), the Renton ordinance constituted a substantial restriction on protected speech. As a result, the Court concluded that the Renton land use restriction had more than an incidental impact on protected speech and could not be sustained under the authority of *Young, supra.*

Appellants argue that the Circuit Court was wrong in concluding that much of the land in the set aside area was unavailable for use by adult theaters. According to Appellants, the test for "availability" of land should be whether, in theory, adult theaters can locate in the set aside area in "the normal course of business." Adoption of that position would undercut the principle of *de novo* review because it would preclude a reviewing court from looking beyond the surface reasonableness of a regulatory scheme to determine if there was any substance to the plan, based upon the record created by its proponents.

B. Renton Failed To Carry Its Burden Of Articulating And Supporting The Basis For Its Zoning Regulation

1. Renton Failed To Demonstrate That Its Ordinance Furthered A Substantial Government Interest

In its review of whether the Renton ordinance met the *O'Brien* test, the Court of Appeals found that it was confronted with nothing more than the City's litany of conclusory findings of fact or "reasons" and an otherwise "very thin" record devoid of any substantiation, other than a recitation of the experiences in other communities such as Detroit or Seattle, which had markedly different characteristics from Renton. Given these circumstances, the Circuit Court held that the City had failed to sustain its affirmative burden of proof to demonstrate that its restriction on a protected means of expression passed the *O'Brien* test in the specific context of Renton's cirmumstances.

This Court has stated: "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State,* 308 U.S. 147 (1939); *Schad* v. *City of Ephraim,* 452 U.S. 52, 71 (1981). But Renton relied on exactly such preferences and beliefs to justify its ordinance here. When called upon by the Circuit Court to explain the basis for its law the City failed to justify its ordinance and the remedies it imposed in the context of its own circumstances. Rather, it relied on prior decisions involving Seattle and Detroit. These decisions are precedent for the proposition that adult theaters may be subject to constitutional time, place and manner constraints

under *O'Brien.* However, the existence of that precedent alone is insufficient to substantiate that Renton's approach was a sufficiently "incidental" restriction which was no greater than necessary to further a valid government interest.

> "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight when the zoning regulation trenches on the First Amendment. In order for a reviewing court to determine whether a zoning restriction that imposes on free speech is 'narrowly drawn [to] further a sufficiently substantial government interest . . . ' the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis.*"

Schad, supra at 77 (concurring opinion).

Confronted with a record in the Renton case which was devoid of any articulated and reasoned basis for the particular ordinance that was devised, the Circuit Court was compelled to find that Renton had failed to sustain its burden. In essence, the reviewing court required more of a justification than a series of self-serving legislative findings based, in part, on the experiences of other cities which may or may not have been relevant to the circumstances in Renton. A contrary decision would have relieved the government of its burden of proof and would have resulted in a decision which paid broad deference to unsubstantiated and conclusory findings born out of the heat of the local legislative process.

2. Renton Failed To Demonstrate That Its Ordinance Was Unrelated To The Suppression Of Speech

An important aspect of Appellants' brief is the emphasis that it places on the Circuit Court's references to "motive" during its review of whether the Renton ordinance was unrelated to the content of the speech being restricted. The issue here is not the use of a particular word by the Ninth Circuit as the Appellants' appear to contend. Rather, it is whether the Ninth Circuit's constitutional analysis consisted of anything more than a straight-forward review of the governmental interests stated in the preamble of the ordiance. In *O'Brien, supra,* this Court rejected a very different type of inquiry into legislative "motive":

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to echew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

United States v. *O'Brien, supra* at 391 U.S. 383-84.

There is nothing in the Circuit Court's decision which provides a basis for concluding that, in referring to "motive", the court was attempting to look behind the face of statement of reasons which was enacted as part of the Renton ordinance. Rather, in ascribing "motive", the Circuit Court of Appeals went no further in its analysis than the statement of reasons appearing on the face of the ordinance. In doing so, the Circuit Court made a factual finding that "many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter." *Playtime Theatres* v. *Renton, supra* at 478 F.2d 537. As a result the Ninth Circuit concluded that Renton had failed to sustain its burden of demonstrating that the governmental interests advanced by the ordinance were unrelated to the suppression of protected speech. Clearly, the type of search for "motive" condemned in *O'Brien, supra,* did not occur in this case.

CONCLUSION

A locality is not prevented from regulating the non-speech aspects of adult theaters simply because that regulation is subject to careful *de novo* scrutiny by the Courts. Nor is that community hamstrung in seeking to protect itself from those impacts simply because it must carry the burden of demonstrating that its regulation is constitutional under the test set forth in *United States* v. *O'Brien, supra.*

There would be little remaining of the requirement that government must sustain the burden of demonstrating the constitutionality of an ordinance under the *O'Brien* test if a locality were simply permitted to rely on facts presented by other localities in prior

cases to justify the unique remedy it has selected in its own circumstances. Reliance by a municipality on the fact that another community's ordinance was upheld by the courts, without more, is not adequate substantiation that the municipality's actions are unrelated to the suppression of protected speech, or that the particular remedy it has selected to deal with a perceived problem only has an incidental impact on expression that is in fact no greater than necessary to serve a substantial governmental interest.

Nevertheless, Appellants urge the Court to accept these premises. The result would be to diminish severely the well established safeguards which enable the courts to effectively review local land use regulations that impinge on protected speech.

Respectfully submitted,

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